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In the Supreme Court of the United States

OCTOBER TERM, 1975

CLARENCE BROWN, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–18a) is reported at 507 F. 2d 1300. The opinion of the district court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1974. The petition for a writ of certiorari was filed on December 20, 1974, and was granted on May 27, 1975 (A. 67a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for federal employment discrimination claims.

2. Whether, if Section 717 is not exclusive, petitioner's complaint was properly dismissed for failure to exhaust administrative remedies.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. 2000e, *et seq.*, is set forth in Appendix A to this brief, *infra*, pp. 1a–18a. Portions of the statute that were amended in 1972 appear in italics.

The Civil Service Commission's Equal Opportunity Regulations, 5 C.F.R. Part 713, are set forth in Appendix B to this brief, *infra*, pp. 19a–52a.

STATEMENT

1. Petitioner, a black employee of the General Services Administration, filed an administrative complaint on July 15, 1971 (A. 15a), alleging that he had been denied a promotion on the basis of race. After preparation and review of an investigative report, a Regional Administrator notified petitioner on October 19, 1972, that there was no evidence of racial discrimination (A. 30a–31a). The letter stated that "the selection for advancement was made from among the best qualified candidates" and that "[t]here is not sufficient evidence in the complaint file to indicate either administrative errors in the selection of Robert Ownbey or racial discrimination against you" (A. 30a).

Petitioner requested a hearing before a certified complaints examiner from another agency (A. 33a). The hearing was held in December 1972, and in February 1973 the complaints examiner issued his findings and recommended decision (A. 34a–42a). He found that "the manner, extent, and degree of an employee's cooperation is a reasonable factor which could be considered by a selecting officer when attempting to choose between two otherwise equally-qualified individuals," that "the evidence contains ample basis for the opinion of complainant's supervisors that he was not *fully* cooperative," and that "the basis for Mr. Brown's nonselection lay in his lack of full cooperation, and was not due to discrimination because of his race" (A. 41a; emphasis in original).

The General Services Administration thereafter issued its final decision determining that the evidence did not support petitioner's complaint of racial discrimination (A. 43a–44a). Petitioner received written notification of that decision, together with a copy of the transcript of the hearing and the findings and recommended decision of the complaints examiner, on March 26, 1973 (A. 45a). The letter of notification advised petitioner that he could appeal the decision to the Civil Service Commission within 15 days of receipt of the letter or challenge the decision by commencing an action in federal district court within 30 days.

Petitioner did not appeal to the Civil Service Commission and did not commence an action in federal district court within 30 days (Pet. Br. 6; Pet. App. 6a).

2. On May 7, 1973—42 days after he received notice of GSA's final decision—petitioner filed a complaint in the United States District Court for the Southern District of New York alleging that he was denied a promotion on the basis of his race and seeking "injunctive orders, damages, costs, attorney's fees and back pay" (A. 1a, 14a). The complaint purported to invoke the district court's jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. III) 2000e, *et seq.*, "with particular reference to § 717 * * *, covering discrimination in federal employment" (A. 3a). It also alleged that jurisdiction was conferred by the general federal question statute, 28 U.S.C. 1331, the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*, and the Civil Rights Act of 1866, as amended, 42 U.S.C. 1981, *et seq.* (A. 3a–4a).[1]

Respondents moved to dismiss the complaint for lack of subject matter jurisdiction (A. 18a–19a), and the district court granted the motion (Pet. App. 1a).

3. The court of appeals affirmed (Pet. App. 2a–18a). It held first that Congress intended Section

[1] Petitioner's motion (A. 48a–49a) for leave to amend his complaint to allege additional bases of jurisdiction under 28 U.S.C. 1343(4) and 1346(a) and (b), and to add an allegation that more than $10,000 was in controversy, was denied by the district court (A. 62a). The court of appeals did not review the denial of the motion, and petitioner does not seek review of the denial in this Court.

717(c) to be the exclusive judicial remedy for federal employment discrimination claims. That remedy, the court reasoned, is retroactively available to any federal employee, such as petitioner, whose administrative complaint was pending at the time Section 717(c) became effective on March 24, 1972. Since petitioner's complaint was untimely under Section 717(c), it was properly dismissed (Pet. App. 9a–15a). The court stated (*id.* at 13a; footnote omitted):

> We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it. In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since * * * Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

Alternatively, the court held that even if Section 717(c) were not the exclusive remedy and petitioner were not bound by the 30-day filing requirement, the complaint was properly dismissed because petitioner

inexcusably failed to exhaust his available administrative remedies by appealing GSA's final decision to the Civil Service Commission, as provided by 5 C.F.R. 713.231 (Pet. App. 16a–17a). The court stated that, even if "exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices" (*id.* at 16a), there is no reason to depart from the general exhaustion requirement in this case (*id.* at 16a–17a):

> [W]e cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. * * *
>
> Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. * * * Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. § 713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated.[2]

[2] In light of its decision, the court found it "unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. § 1361 (1970) (mandamus); the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (1970); the Tucker Act, 28 U.S.C. § 1346(a) and (b) (1970); and 42 U.S.C. § 1981 (1970) and 28 U.S.C. § 1343(4) (1970)" (Pet. App. 15a–16a, n. 13).

SUMMARY OF ARGUMENT

Petitioner's complaint was correctly dismissed for two reasons. First, it was untimely under Section 717 of the Civil Rights Act of 1964.[3] Although petitioner seeks to invoke other statutory bases of jurisdiction under which, he contends, his complaint was not untimely, Section 717 was intended by Congress to be the exclusive judicial remedy for federal employment discrimination claims. Second, even if Section 717 were not exclusive, petitioner's action would be barred because he failed to exhaust the administrative remedy provided by the Civil Service Commission's regulations. Section 717's relaxation of the usual exhaustion rule is unavailable to petitioner, because he did not file his complaint within the time specified by that section.

I

A. Section 717 establishes a comprehensive scheme for enforcing its proscription of employment discrimination in the federal civil service, a scheme that differs significantly from that established by Title VII to enforce a similar proscription of discrimination in the private sector. Unlike the Equal Employment Opportunity Commission (which has conciliation and litigation authority but which is not empowered to adjudicate complaints or award administrative relief),

[3] Section 717 was added by the Equal Employment Opportunity Act of 1972. The provisions of Title VII of the Civil Rights Act of 1964, as amended, are reproduced in full, with italics to indicate the amendments and additions made by the 1972 Act, in Appendix A to this brief, *infra*, pp. 1a–18a.

the Civil Service Commission is authorized by Section 717(b) to enforce the ban on federal employment discrimination "through appropriate remedies, including reinstatement or hiring of employees with or without back pay * * *."

Congress addressed each facet of the enforcement scheme. The Act requires an aggrieved person to file his claim of discrimination initially with the responsible agency, gives him a right to appeal the agency's decision to the Civil Service Commission, permits him at several stages of the administrative process to file a civil action to review his claim, and authorizes the district court, upon a finding of intentional discrimination, to grant injunctive and other appropriate relief.

B. The comprehensiveness of the enforcement mechanism reflects a congressional judgment that the Act would, for the first time, provide a statutory basis for judicial review of federal employment discrimination claims. Congress did not undertake explicitly to repeal any of the statutes that petitioner seeks to invoke, because it determined that under existing law "an aggrieved Federal employee does not have access to the courts" (S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971)). It accordingly fashioned a remedial scheme with the understanding that it would stand alone as the exclusive means of enforcing the prohibition against federal employment discrimination.

The legislative history of Section 717 is thus quite different from that of the non-federal remedial provisions of Title VII. As this Court observed in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and *Johnson* v. *Railway Express Agency, Inc.*, No. 73–1543, decided May 19, 1975, Congress recognized that non-federal employees already had access to the courts under other statutes, and it established an independent remedy designed to supplement the existing remedies and to operate as one portion of a larger remedial scheme. Unlike the non-federal provisions of Title VII, Section 717 is not "premised on the continued existence and vitality of other remedies" (118 Cong. Rec. 3371 (1972) (remarks of Senator Williams)), and reflects no congressional "intent to accord parallel or overlapping remedies" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47).

C. Petitioner argues that all the provisions of Section 717—including its exhaustion requirements, time limitations, and remedial restrictions—may be wholly disregarded at the option of an aggrieved person who determines to invoke some other allegedly available statutory remedy. But that would upset the balance struck by Congress when it enacted Section 717 and would defeat its policy of encouraging the development of effective and expeditious administrative remedies for claims of federal employment discrimination.

Petitioner seeks to invoke the broad language of other statutes to avoid the explicit requirements of later and more specific legislation comprehensively designed to provide the kind of remedy he seeks for the kind of injury he alleges. As in *Preiser* v. *Rodriguez,* 411 U.S. 475, where state prisoners seeking

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immediate or expedited release from confinement attempted unsuccessfully to avoid the exhaustion requirements of the federal habeas corpus statute by invoking provisions of the Civil Rights Act of 1866, "[i]t would wholly frustrate explicit congressional intent to hold that [petitioner] could evade [the statutory] requirement[s] by the simple expedient of putting a different label on [his] pleadings" (411 U.S. at 489–490). Congress has determined that Section 717 "is the appropriate remedy" for federal employment discrimination claims, "and that specific determination must override the general terms" of the statutes relied on by petitioner (*id.* at 490).

II

Even if Section 717 were not exclusive and an action within its purview could properly be brought under other statutes,[4] petitioner cannot maintain this action because he failed to exhaust the administrative appellate remedy provided by the Civil Service Commission's regulations.

A. The Civil Service Commission's Equal Opportunity Regulations establish a three-tiered procedure for the investigation, conciliation, and adjudication of employment discrimination claims. The aggrieved person initially consults with an Equal Employment

[4] We do not address petitioner's lengthy argument concerning the availability of relief under the other statutes he relies upon, because the difficult questions raised by that argument were not decided by the court of appeals, were not specifically presented in the petition for a writ of certiorari, and, in our view, should not now be resolved by this Court (see note 18, *infra*).

Opportunity Counselor in his agency who provides counseling and seeks an informal resolution of the matter.

If resolution is not achieved, the aggrieved person may file a formal complaint with his agency. After completion of a prompt and thorough investigation, and a further opportunity for informal resolution, the complainant is apprised of the agency's proposed disposition of the complaint and of his right to a hearing if he is not satisfied with that disposition. At the hearing, which is conducted by an impartial complaints examiner certified by the Civil Service Commission, the complainant may be represented by counsel, may present evidence, and may cross-examine witnesses. The complaints examiner submits his findings and recommendations to the head of the agency, whose decision is made on the basis of information in the investigative file and hearing record. The decision must give specific reasons for rejecting or modifying the complaints examiner's recommended decision.

The complainant then has the right to appeal the agency's decision to the Civil Service Commission, whose Appeals Review Board considers the entire file and issues a written decision affirming or reversing the agency's decision or remanding to the agency for further investigation or rehearing.

The regulations authorize broad remedial action by the agency or the Commission upon a finding of discrimination, including, where appropriate, reinstatement, hiring, promotion, back pay awards, and cancellation of any adverse action.

The policies served by the traditional rule that judicial relief is unavailable unless prescribed administrative remedies have been exhausted are fully applicable to the Commission's complaint procedures. Full exhaustion of those procedures is necessary to prevent premature interference with the administrative process and to permit the federal agencies and the Civil Service Commission to correct their own errors, apply their expertise to the facts of each case, and compile a record for possible judicial review. Moreover, pursuit of an administrative remedy through which suitable relief may be obtained may obviate judicial intervention or narrow the scope of any necessary judicial review.

Petitioner argues that the Commission's elaborate procedure need not even be commenced, much less exhausted, by any federal employee who chooses to bring an action under statutes other than Section 717. The reasons he gives for such an unprecedented across-the-board exception to the usual exhaustion rule do not support his contention.

Contrary to petitioner's assertions, the resolution of employment discrimination claims depends on an expert understanding of federal civil service personnel management problems, and Congress for that reason determined in 1972 to give the Civil Service Commission administrative jurisdiction over such claims and to strengthen its authority and broaden its responsibilities. Where, as here, the disposition of an administrative claim "depends on careful factual analysis" calling for the application of agency expertise, it is

impermissible to "sidestep * * * the administrative process designed to marshal relevant facts and resolve factual issues in the first instance" (*McGee* v. *United States,* 402 U.S. 479, 488).

There is no basis for petitioner's assertion that resort to the administrative process is futile. This is not a case in which the issues to be resolved are beyond the Commission's competence to decide or in which the nature of the relief sought is beyond the Commission's authority to award. Nor is it accurate to say that claims are almost certainly to be denied. A large proportion of the claims are resolved informally to the satisfaction of the complainant; many others are resolved favorably to the complainant after formal adjudication. Petitioner has not demonstrated that a meritorious complaint is likely to be denied or that a successful complainant is unlikely to obtain appropriate relief.

While reasonable persons may disagree over the fairest and most effective administrative procedures for adjudicating employment discrimination claims, Congress left the resolution of that question to the Commission. The procedures it adopted cannot accurately be characterized as so grossly unfair as to excuse their invocation. Indeed, even when one seeks to attack agency procedures as in violation of due process standards, exhaustion of those procedures is a prerequisite. *Christian* v. *New York State Department of Labor,* 414 U.S. 614.

To accept petitioner's contention that exhaustion is never required would encourage "frequent and de-

liberate flouting" of the administrative complaint procedure (*McKart* v. *United States*, 395 U.S. 185, 195) and would "jeopardize * * * the functional autonomy of the administrative bod[y] on which Congress has conferred the primary responsibility" to adjudicate claims of federal employment discrimination (*McGee* v. *United States, supra*, 402 U.S. at 487).

B. Petitioner's failure to invoke his right to appeal the agency's decision to the Civil Service Commission is therefore a bar to the present action. Though he argues that his agency's delay in reaching a final decision in his case excused him from further exhaustion, he did not complain of that delay to the Civil Service Commission in accordance with the regulations that were then in force, and he should not be heard to complain of it now.

Although Section 717 permits aggrieved persons to file a civil action without first appealing to the Civil Service Commission, that exception to the traditional exhaustion requirement is inapplicable here, because petitioner failed to satisfy the statutory condition of that exception—that the complaint be filed within 30 days of notification of the agency's decision.

Petitioner argues that an administrative appeal would have been futile. But his argument is not supported by the statistics he cites, which show only that the Appeals Review Board affirms agency decisions more often than it reverses them.

ARGUMENT

I

SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964 PROVIDES THE EXCLUSIVE JUDICIAL REMEDY FOR FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS, AND PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE PROVISIONS OF THAT SECTION

A. THE ACT ESTABLISHES A COMPREHENSIVE PLAN FOR ELIMINATING FEDERAL EMPLOYMENT DISCRIMINATION AND ADJUDICATING DISCRIMINATION COMPLAINTS

Section 717 of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. III) 2000e–16, proscribes federal employment discrimination and establishes a comprehensive administrative and judicial enforcement scheme.

Section 717(a) provides that all personnel actions affecting federal employees and applicants for federal employment[5] "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Section 717(b) gives the Civil Service Commission the authority to enforce the provisions of subsection (a) "through appropriate remedies, in-

[5] The section excludes from its coverage aliens employed outside the limits of the United States and employees of the General Accounting Office. It also excludes persons employed by those units of the Government of the District of Columbia and federal legislative and judicial branches that do not have positions in the competitive service.

cluding reinstatement or hiring of employees with or without back pay," and to issue appropriate rules or regulations[6] to carry out its responsibilities under the section.[7]

Section 717(c) gives an aggrieved employee or applicant the right to file a civil action in a federal district court to review his claim of employment discrimination.[8] That right is conditioned, however, upon compliance with timing and exhaustion requirements.

The complainant is required to file his claim initially with the department or agency that has allegedly discriminated against him. If the final decision by the department or agency is adverse, the complainant has a right to appeal to the Civil Service Commission. Alternatively, he may, within 30 days of his receipt

[6] The Commission's equal employment opportunity regulations are codified at 5 C.F.R. Part 713. Section 717(b) of the Act directs the head of each department, agency, or unit to comply with the Civil Service Commission's regulations.

[7] Section 717(b) also provides that each department and agency shall submit to the Commission annually, for its review and approval, an "equal employment opportunity plan" designed "to maintain an affirmative program of equal employment opportunity * * *." The Commission is made responsible for reviewing and evaluating the operation of all such programs, and it is directed to consult with interested individuals and organizations concerning equal employment opportunity.

[8] Section 706(f)(3), 42 U.S.C. (Supp. III) 2000e–5(f)(3), incorporated by Section 717(d), gives the federal district courts jurisdiction over such actions. It provides that an action may be brought in any district in the State in which the discrimination allegedly occurred, in the district in which the relevant employment records are maintained, or in the district in which the aggrieved person would have worked but for the alleged discrimination.

of notice of the department's or agency's final decision, file a civil action directly without appealing to the Civil Service Commission. If he does appeal to the Commission, he may file a civil action within 30 days after receiving notice of the Commission's final decision. In addition, the complainant may file a civil action if, after 180 days from the filing of his initial charge or the filing of his appeal, the department or agency, or the Civil Service Commission, has not yet taken final action on the charge or the appeal.[9]

Civil actions brought under Section 717 are governed by the provisions of Section 706(f) through (k), 42 U.S.C. (Supp. III) 2000e–5(f)–(k), which are incorporated "as applicable" by Section 717(d). In addition to providing for jurisdiction and venue (see note 8, *supra*), Section 706(f) requires that cases be expedited and authorizes the district court to appoint an attorney for the complainant and to allow the action to be commenced without the payment of fees and costs. Section 706(g) authorizes the district court, on a finding that the agency intentionally engaged in unlawful discrimination, to grant injunctive and other appropriate relief, including back pay for a period not to exceed two years prior to the filing of the initial

[9] Section 717(c) also expressly waives sovereign immunity by providing that in a civil action under the section "the head of the department, agency, or unit, as appropriate, shall be the defendant." Petitioner's complaint named as defendants the General Services Administration and three subordinate officials of that agency (A. 3a). Petitioner thereafter sought to amend the complaint (see note 1, *supra*) to add as defendants the Civil Service Commission and the complaints examiner (A. 50a, 52a).

administrative complaint. Section 706(k) gives the district court discretion to allow the complainant, if he prevails, a reasonable attorney's fee as part of the costs.

Finally, Section 717(e) provides that every government agency and official shall retain "primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or * * * under Executive Order 11478 * * *."

Congress thus addressed each facet of the enforcement mechanism. The Act defines with precision the employees and applicants covered and the nature of the discrimination that may be challenged. It establishes an administrative complaint and appeal procedure, specifies the administrative remedies that may be prescribed, imposes both a limited exhaustion requirement and specific time limitations for the filing of a civil action to review the administrative determination, provides for jurisdiction and venue, waives sovereign immunity, specifies certain extraordinary procedures to be followed by the district court, and defines the scope of the district court's remedial authority.

It is undisputed that petitioner's action was untimely under Section 717. After receiving notice of his agency's final decision rejecting his discrimination complaint, petitioner neither appealed to the Civil Service Commission nor filed a civil action within 30 days. He argues that the action nevertheless may be maintained under other statutes that do not impose a 30-day limitation period.

B. SECTION 717 WAS ENACTED WITH THE UNDERSTANDING THAT IT WOULD PROVIDE THE SOLE STATUTORY BASIS FOR JUDICIAL REVIEW OF FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS

Petitioner would have this Court hold that the carefully constructed enforcement scheme established by Section 717 may be ignored altogether if the federal employee merely invokes any of the "diverse arsenal of remedies" (Br. 43) that allegedly were available before the enactment of Section 717. Under those pre-existing remedies, according to petitioner (Br. 43 and nn. 81 and 82): (1) *any* federal employee may bring a civil action seeking relief from alleged federal employment discrimination; (2) an aggrieved employee need exhaust *no* available administrative remedy before filing such an action; (3) an action may be filed without regard to the 30-day limitation period established by Section 717; and (4) the district court may award back pay without regard to the two-year limit under Title VII and may also award compensatory and punitive damages against the government and individual officials.

If these other remedies were available at the time Section 717 was enacted, and if, as petitioner argues, Congress intended that they survive the 1972 enactment, why then did Congress fashion so delicately balanced an enforcement scheme containing procedural and remedial limitations that make it a less attractive remedy in important respects? Petitioner's only answer is that Section 717, unlike the other statutes upon which he relies, "provides for awards of attorneys' fees, court appointed counsel, and waiver

of court costs, features which we may presume are particularly important to aggrieved federal employees of limited resources" (Br. 43, n. 81). While we do not dispute petitioner's presumption, we doubt that Congress intended to create so elaborate a mechanism for so limited a purpose, in effect exacting a substantial procedural and remedial price only from those aggrieved individuals who need the benefits of court-appointed counsel and waiver of court costs.

Petitioner relies upon this Court's decision in *Johnson* v. *Railway Express Agency, Inc.*, No. 73–1543, decided May 19, 1975. The Court there held, in the non-federal employment context, that, "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief" (slip op. 5).

That holding, however, rests upon the explicit legislative history of the 1964 Act, which unequivocally reflects "a congressional intent to allow [a non-federal employee] to pursue independently his rights under both Title VII and other applicable state and federal statutes" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48). As the Court in *Johnson* noted (slip op. 5), the Committee Reports made clear "that the remedies available to the individual under Title VII are co-extensive with the indivdual's [*sic*] right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures

augment each other and are not mutually exclusive." H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 19 (1971); see also S. Rep. No. 92–415, 92d Cong., 1st Sess. 24 (1971).

Petitioner argues that, "[s]ince Title VII did not repeal the section 1981 rights of private employees, it necessarily follows that Title VII did not repeal the section 1981 and other pre-existing rights of federal employees" (Br. 40; footnote omitted). But there is no necessary comparability between the direct judicial remedy (after an opportunity for conciliation efforts) established by Title VII for non-federal employees and the comprehensive system of full administrative remedies and judicial review thereof established by Title VII for federal employees (see note 15, *infra*). In any event, the legislative history of Section 717, unlike that of the 1964 Act, reflects no explicit, or even implicit, congressional intent to preserve any pre-existing judicial remedies for federal employment discrimination.[10] What it does reveal is that Congress thought it was writing on a blank slate and conceived of Section 717 as the sole statutory basis for judicial review of federal employment discrimination complaints.

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[10] Congress rejected in 1972 an amendment proposed by Senator Hruska that would have made Title VII "the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization." (The text of the amendment is reproduced in *Legislative History of the Equal Employment Opportunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 1382 (1972),

When Congress was considering the 1972 legislation, there was at best considerable doubt that federal employees could obtain judicial review of employment discrimination complaints. In a case in which an employee claimed he had been wrongfully denied a promotion, *Gnotta* v. *United States,* 415 F. 2d 1271 (C.A. 8), certiorari denied, 397 U.S. 934, the court held that sovereign immunity barred a federal employment discrimination suit that predicated jurisdiction on the Administrative Procedure Act (5 U.S.C. 701–706), the Mandamus Act (28 U.S.C. 1361), and the Tucker Act (28 U.S.C. 1346). The court in *Gnotta* stated that a suit against the United States seeking a promotion is barred because "[t]he plaintiff has not demonstrated that the United States has consented to be sued"; the same rule applies when

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hereinafter referred to as "Legislative History.") The proposed amendment, however, would have applied only in the non-federal context; neither the United States nor any federal department or agency is included within the Act's definition of "employer." See Section 701(b), 42 U.S.C. 2000e(b). See also 118 Cong. Rec. 3368–3369 (1972), Legislative History 1395–1398 (remarks of Senator Hruska). Contrary to petitioner's suggestion (Br. 42), therefore, no inference from the rejection of the Hruska amendment can properly be drawn concerning congressional intent with respect to the exclusivity of Section 717.

Petitioner relies (Br. 38–39) on language in the Senate Report and remarks on the floor of the Senate to the effect that Section 717 would give federal employees the same right that is granted to private employees to bring a civil action under Title VII. Those statements imply neither an intention to preserve, nor even a recognition of, any pre-existing remedies. They suggest only an intention to allow federal employees, like employees in the private sector, to obtain judicial review of their employment discrimination claims under the provisions of Title VII.

individual federal officers are named defendants, the court stated, because granting the relief sought "would compel those individuals to promote the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area" (415 F. 2d at 1277). See also *Ogletree* v. *McNamara,* 449 F. 2d 93 (C.A. 6), in which the court held that sovereign immunity barred a challenge to the Air Force merit promotion program. Compare *Congress of Racial Equality* v. *Commissioner,* 270 F. Supp. 537 (D. Md.). See generally Comment, *Racial Discrimination in Federal Civil Service,* 38 Geo. Wash. L. Rev. 265 (1969).

The courts of appeals were in conflict over whether federal employees complaining of wrongful discharge were entitled to judicial review. Compare *Pelicone* v. *Hodges,* 320 F. 2d 754 (C.A. D.C.), and *DeLong* v. *Hampton,* 422 F. 2d 21 (C.A. 3), with *Blaze* v. *Moon,* 440 F. 2d 1348 (C.A. 5). Such review as was available did not necessarily extend to an examination of the facts. See *Hargett* v. *Summerfield,* 243 F. 2d 29 (C.A. D.C.), certiorari denied, 353 U.S. 970; *Baum* v. *Zuckert,* 342 F. 2d 145 (C.A. 6).

Hearings before the Committees of both Houses in 1971 evinced congressional concern over the apparent inability of federal employees to obtain judicial review of employment discrimination complaints. See, *e.g.,* Hearings on S. 2515, *et al.,* before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 296, 301, 308, 318 (1971) (hereinafter "Senate Hearings"); Hearings on H.R. 1746 before the General Subcommittee

on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. 320, 322, 385–386, 391–392 (1971) (hereinafter "House Hearings"). Much of the testimony was in conflict. Irving Kator, representing the Civil Service Commission, stated his view that, after exhaustion of administrative remedies, the aggrieved federal employee had a limited right to judicial review of an employment discrimination complaint. House Hearings 385–386. See also *id.* at 320, 322; Senate Hearings 308, 318. Other witnesses expressed their doubts on that score. See Senate Hearings 296; House Hearings 391–392.

Ultimately, the Committees concluded that judicial review was not available at all or that access was doubtful and that some forms of relief were definitely foreclosed. Thus, the Senate Report stated: "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts." S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971), Legislative History 425. And the House Committee observed (H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 25 (1971), Legislative History 85):

> There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available.

The point was reiterated during debate on the Senate floor. Senator Cranston, co-author of the amendment relating to federal employment, stated

that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases * * *." 118 Cong. Rec. 4929 (1972), Legislative History 1744. See also 118 Cong. Rec. 4921 (1972), Legislative History 1723. Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." 118 Cong. Rec. 4922 (1972), Legislative History 1725. Nothing in the Committee Reports or the floor debates contradicts the views of Senators Cranston and Williams.

The Conference Committee accepted the Senate amendment. Its Reports described Section 717 as "providing *the* statutory basis for * * * appeal or court access * * *." H.R. Conf. Rep. No. 92–899, 92d Cong., 2d Sess. 21 (1972), Legislative History 1841 (emphasis added); S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 21 (1972), Legislative History 1819 (emphasis added).

The legislative history of Section 717 is thus quite unlike that of the 1964 Act. The judicial remedy for non-federal employees under Title VII was enacted with the express intention of supplementing the other statutory remedies that Congress recognized as already available to such individuals. It was designed as one part of a comprehensive remedial scheme. The 1972 amendments relating to non-federal employees were likewise "premised on the continued existence and vitality of other remedies for employment discrimination" (118 Cong. Rec. 3371 (1972), Legislative History 1403 (remarks of Senator Williams)).

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Section 717, by contrast, was enacted with the understanding that no other judicial remedies were available for federal employees. It was not "premised on the continued existence and vitality of other remedies" (*ibid.*) but was designed to stand alone as a comprehensive enforcement scheme in itself. Thus, while Congress of course did not undertake expressly to repeal existing statutes that it concluded were inapplicable,[11] it intended Section 717 exclusively to govern judicial review of federal employment discrimination claims within its purview.

The present case therefore differs not only from *Johnson* v. *Railway Express Agency, Inc., supra,* but also from the other cases petitioner cites to illustrate "the general policy of providing * * * a variety of remedies for the protection of important civil rights" (Br. 41–42). In each of those cases, the Court was able to infer from the statute and its legislative history a congressional "intent to accord parallel or overlapping remedies against discrimination" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47).[12] No such in-

[11] Petitioner invokes the established rule that repeals by implication are not favored (Br. 41–42). See *Morton* v. *Mancari*, 417 U.S. 535, 549–551. But that rule is not a meaningful guide to legislative intent in circumstances such as these, where Congress clearly expressed its understanding that there was nothing to repeal.

[12] We adverted above (pp. 20–21, *supra*) to the legislative history of Title VII as applied to non-Federal employees, which plainly reveals an intent "to supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (*Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 48–49). Similarly, in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, the Court found compelling indications in the legislative history of the Fair Housing Title of the Civil Rights Act of 1968 that Congress was aware of the overlapping provisions of 42 U.S.C. 1982 and nevertheless concluded that additional legislation was needed (see 392 U.S. at 413–417). In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, the Court held that the public accommodations provisions of Title II of the Civil Rights Act of 1964 did not supersede the provisions of 42 U.S.C. 1982. As the Court noted (396 U.S. at 237–238), that Title included a savings clause that expressly preserved the right of individuals to pursue other remedies under statutes barring discrimination in public accommodations (42 U.S.C. 2000a–6(b)). In *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, the Court found it unnecessary to consider whether a statutory exemption under Title II of the Civil Rights Act of 1964 implied that the application of 42 U.S.C. 1982 should be similarly limited (see 410 U.S. at 438–439).

[13] Petitioner points (Br. 41) to Section 717(e), which provides that nothing in the Act "shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or * * * under Executive Order 11478 * * *." But that language does not bear upon the existence or preservation of any other judicial remedies. We know of nothing in the legislative history, and petitioner cites nothing, to suggest that Section 717(e) was intended to preserve statutory remedies that Congress determined were non-existent.

tent may be inferred from Section 717 or its legislative history.[13]

C. PERMITTING AGGRIEVED FEDERAL EMPLOYEES TO MAINTAIN ACTIONS DESPITE THEIR FAILURE TO COMPLY WITH THE REQUIREMENTS OF SECTION 717 WOULD DEFEAT THE LEGISLATIVE POLICY EMBODIED IN THAT SECTION

As this Court stated in *Johnson* v. *Railway Express Agency, Inc., supra,* "[a]lthough any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecu-

tion of stale ones" (slip op. 10). The time requirements of Section 717 reflect a general congressional judgment that expedition in resolving federal employment discrimination claims is desirable. The section provides that civil actions alleging federal employment discrimination must be filed within 30 days after notification of the agency's final decision or of the Civil Service Commission's final action on appeal, but that if action on the initial charge or the appeal is delayed beyond 180 days, then a suit may be commenced at any time before such final action is taken.

Petitioner chose not to file a complaint before his agency issued its final decision, and he neither invoked the available appeal mechanism nor commenced this action within the 30 days allowed by statute. Permitting the action to be maintained in these circumstances would nullify the legislative policy underlying Section 717's time requirements.

The situation here is analogous to that in *Preiser* v. *Rodriguez,* 411 U.S. 475. The issue there was whether state prisoners challenging the fact or duration of their confinement and seeking immediate or expedited release from imprisonment may obtain equitable relief under 42 U.S.C. 1983, despite the availability of a clearly and specifically applicable remedy under the federal habeas corpus statute, 28 U.S.C. 2254. The availability of federal habeas corpus is conditioned upon the applicant's exhaustion of state judicial remedies, and the prisoners in *Rodriguez* sought to avoid that requirement by invoking the provisions of the Civil Rights Act. Like petitioner in the present case, they argued that, "since their complaints plainly came

within the literal terms of [the Civil Rights] statute, there is no justifiable reason to exclude them from the broad remedial protection provided by that law" (411 U.S. at 488).

The Court stated, however, that "[t]he broad language of § 1983 * * * is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies" (*id.* at 489). When Congress amended the habeas corpus laws in 1948, it "clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws" (*ibid.*). The Court accordingly concluded (*id.* at 489–490):

> It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

The same analysis is applicable here. Like the prisoners in *Preiser* v. *Rodriguez,* petitioner here invokes the broad language of the Civil Rights Act in an effort to avoid an explicit requirement of a later and more

specific statute comprehensively designed to provide precisely the kind of remedy he seeks for precisely the kind of injury he alleges. As in *Rodriquez,* it would "wholly frustrate explicit congressional intent" to permit petitioner to evade the clearly applicable 30-day time requirement of Section 717 "by the simple expedient of putting a different label on [his] pleadings" (*ibid.*). In the absence of legislative history to the contrary, the specific provisions of Section 717, like the specific federal habeas corpus statute in *Rodriguez,* "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies" (*id.* at 489).[14]

Although the circumstances of this case only partially illustrate the other consequences that would fol-

[14] The considerations of federal-state comity that account for the exhaustion rule in federal habeas corpus actions obviously differ from the considerations underlying the time requirements of Section 717 (which were designed in large part to encourage the development of expeditious and effective administrative remedies). But that difference does not mean that the analysis in *Preiser* v. *Rodriguez* is inapplicable here. The Court's emphasis on comity considerations in *Rodriguez* was in response to a contention that the policy of the exhaustion requirement, and therefore the requirement itself, is inapplicable when the prisoner is challenging the actions of a state administrative body rather than of a state court. This Court concluded that the underlying policy was broader than merely avoiding unnecessary interference by one court with the courts of another sovereign and that the exhaustion requirement was fully applicable to the prisoners' challenges (411 U.S. at 490–492). There is here no doubt that Section 717's time requirement is applicable. Nothing in the *Rodriguez* opinion suggests that a clearly applicable statutory requirement may be ignored if its underlying policy is different from, or relatively less important than, the comity principles underlying the federal habeas corpus exhaustion rule.

low from petitioner's theory, his contention is that a federal employee alleging unlawful discrimination may file a civil action not only in disregard of the express time requirements of Section 717 but also without first presenting his complaint to his own agency at all.

Congress struck a delicate balance between the competing objectives of permitting aggrieved federal employees to obtain prompt judicial review of their discrimination claims and giving the federal government an opportunity to keep its own house in order by adjudicating such claims in the first instance. It determined that no civil action should be filed until the employee's agency has had a reasonable opportunity to consider the claim. The judicial remedy was not to be invoked until the agency either reached a final decision or failed to do so within 180 days. Similarly, while determining that an appeal to the Civil Service Commission should be optional rather than mandatory, Congress concluded that, once such an appeal is filed, judicial review should not be available until the Commission takes final action or fails to do so within 180 days.

Petitioner says, however, that this meticulously designed structure—obviously intended to encourage the development of effective and expeditious administrative remedies for federal employment discrimination—can be wholly disregarded at the employee's option if he simply determines to invoke some other judicial remedy. "Under remedies other than Title VII, particularly section 1981, a federal employee would not be subject to the limited exhaustion requirement of section 717(c)" (Br. 43, n. 81). We ar-

gue in the following section of this brief that Section 717 in fact represents a relaxation of the otherwise applicable exhaustion requirements, and that a federal employment discrimination suit under any other allegedly applicable statute could not be commenced without first invoking *all* available administrative remedies, including an appeal to the Civil Service Commission.

Under petitioner's theory, however, a federal employee would be free to go immediately to court without first apprising even his own agency of his claim of discrimination. Alternatively, he could file a complaint with his agency, await the outcome of an investigation or the commencement of a hearing, and then decide to file a judicial action without awaiting the agency's final decision or the passing of 180 days. He would be free also to abort an appeal by filing an action without awaiting a decision under the administrative appeal procedures he invoked. Even after a final agency decision, or indeed a final administrative decision by the Civil Service Commission, he presumably could file an independent suit raising the same claim *de novo,* rather than a suit under Section 717 for review of the administrative decision [15]—thus frustrating the congressional scheme to strengthen the development of the administrative remedies. In sum, the employee would be free to file an action irrespective of the Section 717 procedures, so long as he did

[15] The question whether a complainant who brings a civil action under Section 717 is entitled to a full trial *de novo* in the district court is presented in three petitions for writs of certiorari pending in this Court. *Chandler* v. *Johnson*, No. 74–1599; *Salone* v. *United States*, No. 74–1600; *United States* v. *Sperling*, No. 75–247.

so within the time provided by the applicable state statute of limitations.[16]

Surely this is not what Congress had in mind when it enacted Section 717. If, as in 1964, Congress had clearly expressed its determination that the existence of such overlapping remedial schemes would be consistent with its objectives in enacting the Title VII remedy, this would be a different case. In creating the enforcement scheme for federal employees, however, Congress did not envision that the procedures so clearly spelled out in the statute could thus be disregarded or aborted by any federal employee who chose not to follow them, and thus that thousands of federal employment discrimination complaints (see Pet. Br. 53; App. 9aa) could be filed directly in the federal district courts each year.

Petitioner's theory would effectively nullify the requirements of the statute and would defeat the congressional policy for the development of effective administrative remedies that those requirements reflect. Congress has determined that Section 717 is the appropriate mechanism to be used by federal employees claiming unlawful discrimination. As in *Preiser* v. *Rodriguez, supra,* 411 U.S. at 490, "that specific determination must override the general terms" of the other statutes that petitioner purports to invoke.[17]

[16] Petitioner states that the New York limitations period applicable to this case is three years and that some states allow a shorter period (Br. 47–48 and n. 91).

[17] Petitioner also argues that an employee who elects to proceed under statutes other than Section 717 "would be entitled in appropriate circumstances to punitive or compensatory damages against the government officials individually" (Br. 43, n. 81). Without

II

EVEN IF PETITIONER'S FAILURE TO COMPLY WITH THE TIME REQUIREMENTS OF SECTION 717 IS NOT A BAR TO THIS ACTION, HIS COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES

If the Court agrees with our contention that Section 717 is the sole statutory basis for judicial review of federal employment discrimination claims, it need not consider petitioner's contention that exhaustion of administrative remedies is unnecessary under statutes other than Section 717, because the complaint in this case was concededly filed out of time under that

conceding the correctness of that contention, we note that the Court in *Preiser* v. *Rodriguez*, *supra*, responded to a similar claim concerning the availability of damages under Section 1983 by emphasizing that the exclusivity of the habeas corpus procedure applies only to actions challenging the fact or duration of confinement and seeking immediate or speedier release. A damages claim, the Court ruled, would not fall within the purview of the habeas corpus remedy and could be pursued under the Civil Rights Act without the need for exhausting state remedies (411 U.S. at 493–494). Assuming, *arguendo*, that petitioner could successfully overcome potential jurisdictional and official immunity obstacles to pursuing a separate claim for damages against individual federal officials, it may be that a similar answer would be appropriate in this context.

Petitioner, however, did not specifically seek such damages in this case, and, while his complaint included a broad prayer for "such relief as may be appropriate, including * * * damages" (A. 14a), the question of the availability of such relief against individual officers was not considered by the court of appeals and is not among the questions presented in the petition for a writ of certiorari in this case.

section. Our argument in this portion of the brief is predicated on the assumptions that Section 717 is not exclusive and that an action alleging federal employment discrimination may properly be brought under one or more of the other statutes invoked by petitioner.[18]

We submit, on those assumptions, that petitioner's failure to appeal to the Civil Service Commission the General Services Administration's final decision rejecting his claim of racial discrimination is a bar to his present action. Although Section 717 authorizes an aggrieved federal employee to file a civil action without first invoking the established administrative

[18] Petitioner argues at length (Br. 11–37) that jurisdiction is conferred by five different statutes enacted prior to the enactment of Section 717. Whether those statutes confer subject matter jurisdiction and whether they constitute waivers of sovereign immunity with respect to federal employment discrimination claims are difficult questions. Although they were briefed and argued in the court of appeals, that court found it unnecessary to resolve them in view of its disposition of the case (see note 2, *supra*). Moreover, while petitioner's brief on the merits describes the first question presented as whether "jurisdiction over this action [is] conferred by statutes enacted prior to the adoption in 1972 of section 717 of Title VII" (Br. 1), the petition for a writ of certiorari presented the different question whether Section 717 repealed *pro tanto* four of the five statutes that petitioner now seeks to invoke (Pet. 2).

Even if the question framed by the brief is properly considered to be "fairly comprised" within the question presented by the petition (see Rule 23(1)(c) of the Rules of this Court), we submit that, if the Court concludes that Section 717 is not exclusive and that petitioner's failure to exhaust the available administrative remedies is not a bar to this action, it should remand the case to the court of appeals to permit that court to consider the jurisdiction and sovereign immunity issues in the first instance. See, *e.g.*, *Richardson* v. *Morris*, 409 U.S. 464.

appeal procedure, that statute represents a conditional relaxation of the usual rule that available administrative remedies must be pursued to their conclusion at the highest administrative level. Since petitioner did not file his action within the 30 days allowed by Section 717, he failed to satisfy the condition and was required to exhaust the administrative appellate remedy before seeking judicial review.

Petitioner's argument that he is entitled to maintain this action notwithstanding his failure to exhaust administrative remedies takes two forms. First, he contends broadly that *no* administrative remedies need be exhausted by a federal employee challenging alleged employment discrimination under statutes other than Section 717 (Br. 44–61). Second, he contends that his agency's delay in processing his initial charge excused him from invoking further administrative remedies (Br. 61–65). Neither contention withstands scrutiny.

A. EXHAUSTION OF AVAILABLE ADMINISTRATIVE REMEDIES IS A PRECONDITION TO THE FILING OF AN ACTION SEEKING RELIEF FROM ALLEGED FEDERAL EMPLOYMENT DISCRIMINATION

1. The policies underlying the exhaustion doctrine are applicable to federal employment discrimination claims.

Petitioner's effort to obtain judicial review of his discrimination claim without having invoked the Civil Service Commission's appeal procedure "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51). For it is settled that the exhaustion doctrine "does not require merely the initiation of prescribed administrative procedures"; it requires "pursuing them to their appropriate conclusion and * * * awaiting their final outcome before seeking judicial intervention" (*Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767).

"[T]he doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue" (*Weinberger* v. *Salfi,* No. 74–214, decided June 26, 1975, slip op. 13). The Civil Service Commission's administrative scheme, established pursuant to its authority under Section 717(b) of the Civil Rights Act of 1964 and a series of Executive Orders proscribing discriminatory employment practices in the federal civil service,[19] provides comprehensively for the investigation, conciliation, and adjudication of federal equal employment opportunity complaints.

The Commission's Equal Opportunity Regulations, as amended in October 1972, 5 C.F.R. Part 713,[20]

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[19] See Executive Order 9830, 3 C.F.R., 1943–1948 Comp., pp. 606–624; Executive Order 9980, 3 C.F.R. 1943–1948 Comp., pp. 720–721; Executive Order 10577, 3 C.F.R., 1954–1958 Comp., pp. 218–225; Executive Order 10590, 3 C.F.R. 1954–1958 Comp., pp. 237–239; Executive Order 10925, 3 C.F.R., 1959–1963 Comp., pp. 448–454; Executive Order 11222, 3 C.F.R., 1964–1965 Comp., pp. 306–311; Executive Order 11246, 3 C.F.R., 1964–1965 Comp., pp. 339–348; Executive Order 11375, 3 C.F.R., 1966–1970 Comp., pp. 648–686; Executive Order 11478, 3 C.F.R., 1966–1970 Comp., pp. 803–805; Executive Order 11590, 36 Fed. Reg. 7831 (1971).

[20] The regulations are reproduced in Appendix B to this brief, *infra*, pp. 19a–52a.

provide that a person who believes he has been discriminated against on the basis of race, color, religion, sex, or national origin may, within 30 days of the matter causing him to believe he has been discriminated against, consult with an Equal Employment Opportunity Counselor in his agency, who makes inquiry into the matter, seeks an informal resolution of it, and counsels the aggrieved person. 5 C.F.R. 713.213(a), 713.214(a)(1)(i). If the matter has not been resolved after the Counselor's final interview with the aggrieved person or after 21 days, whichever comes first, the person must be informed in writing of his right to file a formal discrimination complaint within 15 days from receipt of the notice. 5 C.F.R. 713.213(a), 713.214(a)(1)(ii).

If a complaint is filed, the agency's Director of Equal Employment Opportunity initiates a prompt investigation, to be conducted by a person outside the jurisdiction of the head of the part of the agency in which the complaint arose. 5 C.F.R. 713.216(a). The investigator is charged with conducting "a thorough review of the circumstances under which the alleged discrimination occurred" (*ibid.*), and he is empowered to require the cooperation of all agency employees and the giving of sworn testimony by all employees having knowledge of the matter under investigation. 5 C.F.R. 713.216(b).

When the investigative file is completed, it is furnished to the complainant, who is then afforded a fresh opportunity to discuss the matter with appropriate officials and to resolve the complaint informally. 5 C.F.R. 713.217(a). If the matter is not resolved, the complainant must be notified in writing of the proposed disposition of the complaint, of his right to a hearing and decision by the agency head if such a request is made within 15 days, and of his right to a decision by the agency head without a hearing. 5 C.F.R. 713.217(b).

If a hearing is requested, it is conducted by a qualified complaints examiner, certified by the Civil Service Commission, who must be an employee of a different agency. 5 C.F.R. 713.218(a). The complaints examiner reviews the investigative file, and, if he determines that further investigation is necessary, may remand the complaint for further investigation or may arrange for the appearance of witnesses necessary to supply the needed information at the hearing. 5 C.F.R. 713.218(b). The complaints examiner is directed to conduct the hearing so as to elicit all "[i]nformation having a bearing on the complaint or employment policy or practices relevant to the complaint * * *." 5 C.F.R. 713.218(c)(2). The complainant may cross-examine witnesses (*ibid.*) and may request that the complaints examiner arrange for the presence as a witness of any federal employee who would furnish pertinent testimony. 5 C.F.R. 713.218(e). The hearing is recorded and transcribed verbatim. 5 C.F.R. 713.218(f).

The complaints examiner thereafter transmits to the head of the complainant's agency his findings of fact and recommended decision, including his recommendations for any appropriate remedial action "with

regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose." 5 C.F.R. 713.218(g).

The agency head makes his decision concerning the complaint on the basis of the information in the complaint file, including the hearing record. The decision is in writing and is sent to the complainant, together with a copy of the complaints examiner's findings and recommendations and a copy of the hearing record. If the decision rejects or modifies the examiner's recommended decision, specific reasons for that action must be given. The complainant must be notified of his right to appeal to the Civil Service Commission within 15 days or to file a civil action within 30 days. 5 C.F.R. 713.221.

Appeals are considered without a hearing by the Commission's Appeals Review Board (formerly the Board of Appeals and Review). The Board reviews the complaint file and all relevant written representations made to it. It may remand a complaint to the agency for further investigation or for a rehearing, or it may arrange for additional investigation to be conducted by Commission personnel. The Board is directed to issue a written decision setting forth the reasons for its action on the appeal and informing the complainant of his right to file a civil action within 30 days. 5 C.F.R. 713.234.

Although the Board's decision is final, the Commissioners may reopen and reconsider any decision upon a showing that new and material evidence is available, that the decision involves an erroneous interpretation of law or misapplication of policy, or that the decision involves new policy considerations of general importance or is otherwise so exceptional as to merit the attention of the Commissioners. 5 C.F.R. 713.235.

The regulations authorize broad remedial action by the agency or the Commission upon a finding of discrimination. In the case of a rejected applicant who would have been hired in the absence of improper discrimination, the agency must offer the applicant employment of the type and grade denied him, together with back pay and employment credit from the date he would have been hired but for the discrimination (but not earlier than two years prior to the filing of the formal administrative complaint). 5 C.F.R. 713.271(a).

In the case of an existing employee who was denied an employment benefit because of improper discrimination, the agency must take whatever remedial measures may be appropriate, including retroactive promotion with back pay (with the same two-year limitation), cancellation of an unwarranted personnel action, or elimination from the agency's records of any reference to an unwarranted disciplinary action. 5 C.F.R. 713.271(b).

The regulations provide that at every stage of the complaint process, including the pre-complaint counseling stage, "the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing." 5 C.F.R. 713.214(b).

They also provide that "[t]he complaint shall be resolved promptly"; both the complainant and the agency must "proceed with the complaint without

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undue delay so that the complaint is resolved within 180 calendar days after it was filed * * *." 5 C.F.R. 713.220(a). If an agency has neither issued a final decision nor requested the Commission to supply a complaints examiner within 75 days, "the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint * * *." 5 C.F.R. 713.220(c). If the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 days after the complaint was filed, the recommended decision becomes the final decision binding on the agency 30 days after its submission. 5 C.F.R. 713.220(d).

The important policies that underpin the exhaustion rule are fully applicable to the Commission's administrative scheme and require that an aggrieved person pursue his administrative remedies at each stage of the complaint process, including the appellate stage. Exhaustion is required here, as in other contexts, in order to prevent "premature interruption of the administrative process" (*McKart* v. *United States,* 395 U.S. 185, 193), "so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review" (*Weinberger* v. *Salfi, supra,* slip op. 13). Moreover, "practical notions of judicial efficiency" strongly favor application of the exhaustion requirement; since "[a] complaining party may be successful in vindicating his rights in the administrative process[,] * * * the courts may never have to intervene" (*McKart* v. *United States, supra,* 395 U.S. at 195). Even when judicial intervention is not obviated, "[t]he rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions" (*Schlesinger* v. *Councilman,* 420 U.S. 738, 756).

2. There is no reason broadly to exempt all federal employment discrimination claims from the exhaustion requirement.

Petitioner seeks a broad and unprecedented exemption from the usual exhaustion requirement that would permit federal employees to obtain judicial review of their employment discrimination claims without even commencing, much less exhausting, the applicable administrative procedures. We know of no case, and petitioner cites none, in which this Court has sanctioned the wholesale bypassing of a federal administrative remedy which, if pursued, could lead to a vindication of the complainant's rights and appropriate administrative relief through adjudicatory processes. There is no reason to take that drastic step here.[21]

Petitioner contends that the Civil Service Commission's complaint procedures may properly be ignored because "[t]he agencies have no particular expertise

[21] Indeed, the only other court of appeals which has considered the issue agreed with the court below that exhaustion of administrative remedies is required. *Penn* v. *Schlesinger*, 497 F.2d 970 (C.A. 5) (*en banc*), petition for certiorari pending, No. 74-476.

to offer" and "the federal courts are considerably more expert in the applicable legal problems" (Br. 49). The Civil Service Commission, however, has had equal employment opportunity enforcement responsibility with respect to the federal civil service since 1965. The adjudication of employment discrimination claims necessarily draws upon, and adds to, the Commission's accumulated expertise in administering the federal government's long-standing non-discrimination policy.

Petitioner mistakenly suggests that the Commission's expertise is limited to matters of "ordinary personnel management" and not "unlawful discrimination" (Br. 49). Evaluating a claim of unlawful discrimination requires an intimate understanding of personnel management. Indeed, the principal investigative and adjudicative inquiry in such cases often is whether the personnel action complained of reflected legitimate management considerations or illegitimate discriminatory considerations. The Commission's fact-finding task is to distinguish between the two, and its expertise naturally extends to the recognition of both.[22]

[22] See *United States* v. *Ruzicka*, 329 U.S. 287, where, in an action by the government to enforce an order of the Secretary of Agriculture requiring a milk handler to pay money into a producer-settlement fund, the Court held that the defendant, having failed to invoke its administrative remedy before the Secretary, could not defend against the action on the ground that the demand to pay was based on a faulty inspection of its accounts and improper tests of its milk. The defendant argued that the district court may not enforce an order not "in accordance with law." The Court, in language applicable by analogy to petitioner's contention concerning unlawful discrimination, responded (329 U.S. at 294): "[W]hether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. * * * [T]hey are questions of law arising out of, or entwined with, factors that call for understanding of the * * * industry."

Petitioner asserts that "Congress expressly concluded in 1972 that the Civil Service Commission itself was lacking in such expertise" (Br. 49). What petitioner ignores is that the 1972 Act was designed to build upon the Commission's expertise and to bolster its authority to eliminate federal employment discrimination. Thus, while Congress may not have been fully satisfied in 1971 with the Commission's success in eradicating discrimination, and while the bill proposed by the House Committee would have transferred jurisdiction over federal employment discrimination matters to the Equal Employment Opportunity Commission,[23] the bill passed by the House did not cover federal employees at all,[24] and both Houses ultimately determined to vest continued jurisdiction in the Civil Service Commission and to strengthen its authority and broaden its responsibilities.

The Report of the Senate Committee stated that the "task for the Civil Service Commission is to develop more expertise in recognizing and isolating the various forms of discrimination which exist in the system it administers." S. Rep. No. 92–415, 92d Cong., 1st Sess. 14 (1971), Legislative History 423. It was "[i]n order to assist the Commission in accomplishing

[23] See H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 24–25, 32, 56–57 (1971), Legislative History 84–85, 92, 116–117.

[24] See Legislative History 326–332.

its goals" that the Committee proposed, and Congress adopted, measures "intended to strengthen the enforcement powers of the Civil Service Commission * * *." S. Rep. No. 92–415, *supra,* at 15, Legislative History 424.

The 1972 Act thus represents a congressional judgment that the Civil Service Commission's experience should be the foundation of a strengthened enforcement effort. It is reasonable to assume that the Commission's increased responsibilities and additional enforcement experience since the statute's enactment have enhanced rather than diminished its expertise in employment discrimination matters. To excuse exhaustion of Commission remedies on the ground that the Commission is without expertise would hardly comport with the legislative determination to maintain the Commission as the expert agency in such matters.

Petitioner also contends (Br. 51) that exhaustion is superfluous because there is no need in cases such as the present one for a factual record. But employment discrimination claims obviously turn on the peculiar facts of each case, and a factual record in these cases, no less than in rate-making cases or other administrative agency litigation, is an essential foundation for effective judicial review. Even if an aggrieved person were entitled to *de novo* judicial review of his discrimination claim,[25] the existence of a full administrative record might enable the court to avoid needless evidentiary duplication. See *Schlesinger* v. *Councilman,*

[25] See note 15, *supra.*

supra, 420 U.S. at 756; cf. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 59–60.

A failure to pursue the established complaint procedures for discrimination claims would, as in *McGee* v. *United States,* 402 U.S. 479, 486, "jeopardize the interest in full administrative fact-gathering and utilization of agency expertise * * *." It proves little to say, as petitioner does, that "[o]nce the facts are established, the conclusions and remedy follow as a matter of law" (Br. 50). Where, as here, the disposition of a claim "depends on careful factual analysis," it is impermissible to "sidestep * * * the administrative process designed to marshal relevant facts and resolve factual issues in the first instance" (*McGee* v. *United States, supra,* 402 U.S. at 488).[26]

Petitioner asserts, however, that resort to the administrative process is futile (Br. 51–54). His contention is that the Commission's complaint process rarely results in awards of back pay or retroactive promotions, that the procedure is ineffective and unfair, and that the regulations do not authorize relief as broad as that to which a person might be entitled in court.

There may, of course, be instances when a failure to exhaust administrative remedies is excused because exhaustion would be futile. In *Weinberger* v. *Salfi,*

[26] Cf. *Far East Conference* v. *United States,* 342 U.S. 570, 574: In "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

supra, for example, full exhaustion was excused because "the Secretary * * * determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide" (slip op. 15).[27] But federal employment discrimination claims do not ordinarily turn on issues beyond the competence of the Civil Service Commission to decide; nor is the nature of the relief sought ordinarily beyond the Commission's authority to award.

It is one thing to excuse exhaustion in a particular case in which prior administrative consideration of a claim could serve no useful purpose. It is quite another thing to excuse exhaustion across the board for all claimants simply because most claims do not result in the fullest possible administrative relief. In a scheme that emphasizes informal conciliation and authorizes a wide variety of relief appropriate to the particular facts, statistics showing the number of complainants who secure the most extensive relief available through formal adjudication are not especially meaningful.

Thus, while petitioner states that only a handful of complainants were awarded back pay or retroactive promotions in fiscal year 1973 (Br. 52–53),[28] the report on which he relies also shows that only about one out

[27] The Court noted that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (*Weinberger* v. *Salfi*, *supra*, slip op. 15).

[28] The actual figure used by petitioner, drawn from a report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (1975), is incorrectly characterized in petitioner's brief. The report states that "retroactive relief was provided in 22 (or 3 percent) of 778 cases in which

of every ten informal complaints ripens into a formal complaint and that 35 to 45 percent of the informal complaints are followed by some form of corrective action, including promotion, reinstatement, reassignment, and reduction or rescission of adverse action.[29]

action was taken to correct discrimination" (p. 85). The Civil Service Commission official who provided the statistical information to the Civil Rights Commission's telephone interviewer (see p. 85, n. 292) has informed us that the figures relate to final action taken by the various employing agencies on formal complaints and do not include action taken at the informal counseling stage or by the Commission on appeal. The 22 cases—referred to in the report as instances in which "retroactive relief was provided," and in petitioner's brief as instances in which "federal employees received back pay or retroactive promotions" (Br. 53)—actually represent only instances in which employing agencies awarded back pay. The figure does not include awards of retroactive promotions without back pay. We are also informed that the total figure of 778 referred to in the report is inaccurate. The correct figure is 718.

The Civil Service Commission has furnished us with the following figures for fiscal year 1974. There were 2,650 final agency dispositions of formal discrimination complaints, of which 1,410 were decided on the merits, 870 were withdrawn by the complainant (with or without informal resolution), 265 were rejected as untimely or outside the purview of the regulations, and 105 were cancelled for non-prosecution. Agencies took corrective action in 985 (or 43 percent) of the cases decided on the merits or withdrawn by the complainant. In 16 percent of the cases in which corrective action was taken, the complainant was awarded a prospective promotion; in four percent of the cases, he was awarded back pay; in six percent of the cases, he was awarded retroactive promotion. (Where both back pay and retroactive promotion were awarded, the case was counted in both categories.)

[29] *The Federal Civil Rights Enforcement Effort—1974*, *supra*, p. 67 and n. 221. Not all corrective action entails specific relief to the complainant. Included among corrective actions taken by agencies are improvements in personnel practices and in equal employment opportunity practices.

The report also states that the employing agencies made findings of discrimination in 12.8 percent of the formal complaints considered on the merits in fiscal year 1974.[30] A significant proportion of the cases appealed to the Commission resulted in findings of discrimination, reversals of agency decisions on other grounds, or remands for further investigation.[31]

This is not a process that can accurately be characterized as futile. Many complaints that might otherwise be brought to the courts in the first instance are resolved informally to the satisfaction of the complainant. Many others are resolved favorably to the complainant after formal adjudication. Petitioner has not demonstrated that any *meritorious* complaint is likely to be denied or that less than adequate relief is likely to be awarded.

Nor is this a case in which it can be said that the available procedures are so grossly unfair that a complainant should be excused from invoking them. Though reasonable persons may differ concerning the fairest and most effective procedures for the adjudication of discrimination claims, Congress determined to leave the resolution of that question to the Commission by authorizing it in Section 717(b) to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsi-

[30] *Id.* at 79, n. 272. When all final dispositions are taken into account, including rejections and cancellations of complaints, the figure is seven percent. *Id.* at 79. As the figures stated in note 28, *supra*, indicate, corrective action is frequently taken even without a finding of discrimination.

[31] *Id.* at 82. See p. 57, *infra*.

bilities * * *." Some believe that the complaint procedure established by the Commission pursuant to that authority could be improved upon. But that is a matter for the Commission's judgment (or for further congressional consideration).

No one could reasonably contend that the procedures fail to comply with due process standards.[32] Yet this Court has held that even a person claiming that agency procedures are inadequate under the due process clause must first invoke and exhaust those procedures. *Christian* v. *New York State Department of Labor,* 414 U.S. 614.

Even if one assumes, as petitioner does, that some aggrieved persons might obtain broader relief in court than the Commission's regulations authorize, that does not mean that the administrative remedy is futile or ineffectual. The complainant may be successful in securing at least a portion of the relief he seeks administratively, and he may determine at the conclusion of the administrative process that resort to the courts is not necessary. If he elects to file a civil action, the

[32] The regulations provide for the right to a hearing before a qualified, impartial complaints examiner, at which the complainant may be represented by counsel, may cross-examine witnesses, and may present evidence. Testimony is under oath and is recorded verbatim. The complaints examiner must make written findings and recommendations, and, if the agency head rejects or modifies the examiner's recommended decision, he must state his reasons in writing. The complainant has a right to appeal to the Civil Service Commission and to submit additional written information or argument. The Commission must issue a written decision. The regulations thus more than satisfy the minimum standards of procedural due process. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254.

resulting dispute will presumably be narrower than it would otherwise have been. And even if the complainant is unsuccessful administratively, the record compiled by the agency may obviate some of the trial litigation that would otherwise have been required (see p. 46, *supra*).

Petitioner advances several additional reasons for exempting all federal employment discrimination claims from the exhaustion requirement, but none requires extensive comment.

He contends that "[f]ederal employees should not be subjected to the burden of an exhaustion requirement from which all state and private employees are immune" (Br. 46). Even if his premise were correct,[33] the conclusion would not follow from it. Private and state employees do not have access to the elaborate adjudicative procedures made available to federal employees by the Civil Service Commission's regulations, under which an aggrieved person, if successful, can achieve extensive and suitable relief.[34]

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[33] In *Johnson* v. *Railway Express Agency, Inc.*, *supra*, which involved a private employee's suit alleging employment discrimination under 42 U.S.C. 1981, the Court expressly reserved the question "whether a § 1981 claim of employment discrimination is ever subject to a requirement that administrative remedies be exhausted" (slip op. 3, n. 3). See, also, *Eisen* v. *Eastman*, 421 F.2d 560, 568–569 (C.A. 2), certiorari denied, 400 U.S. 841, discussing the circumstances in which exhaustion of state remedies is required.

[34] The Equal Employment Opportunity Commission has no authority to adjudicate discrimination complaints or to grant the kind of administrative relief that the Civil Service Commission is empowered to award. See Section 706 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e–5. Cf. *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 210.

That the exhaustion requirement "often poses a serious burden on the employee" (Br. 58) is not a reason to dispense with it. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24. Indeed, as petitioner admits, the administrative process "is less expensive, less formal, and less time consuming than an ordinary court case" (*ibid.*)—and the employee, of course, has a right to ultimate judicial review.

Petitioner argues that the exhaustion requirement is counterproductive because it would require the courts to devote valuable resources to "resolving scholastic controversies about the 'correct' way to exhaust," when those resources "would be far better spent deciding these cases on the merits" (Br. 57). The clarity and relative simplicity of the Commission's regulations, however, leave little room for doubt concerning the "'correct' way to exhaust." And, while questions concerning the exhaustion of administrative remedies, like other threshold jurisdictional issues, may occasionally occupy the attention of the courts, it is obviously unrealistic to suppose that abandoning the exhaustion doctrine altogether in federal employment discrimination cases would *reduce* the workload of the federal judiciary.

Finally, petitioner asserts that the "requirement of exhaustion may tend to undermine the effectiveness of the administrative process" by encouraging employees who are determined to seek judicial review to "substantially abbreviate it by waiving various aspects of the process" in order to "decrease the likelihood of

any favorable administrative ruling and increase the probability that judicial intervention will be required" (Br. 59–60).[35] On the other hand, says petitioner, the administrative process would be strengthened by giving employees "direct access to the courts" (Br. 61). Since the Commission "would naturally prefer" to avoid court litigation, it would have an incentive to "render [the administrative] process attractive to employees" to encourage its use (*ibid.*).

These fanciful suppositions turn the policy of the exhaustion doctrine on its head. What undermines an administrative process is not its invocation but its "frequent and deliberate flouting" (*McKart* v. *United States, supra,* 395 U.S. at 195). To eliminate the exhaustion requirement would be to encourage not "reform" (Br. 61) but atrophy. It would "jeopardize * * * the functional autonomy of the administrative bod[y] on which Congress has conferred the primary responsibility" to adjudicate claims of federal employment discrimination (*McGee* v. *United States, supra,* 402 U.S. at 487).

Petitioner's notions of administrative autonomy and judicial efficiency are the antithesis of those expressed by this Court in *McKart* and other cases. There is no reason to depart here from the general doctrine that exhaustion of administrative remedies serves rather than disserves those important objectives.

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[35] Waiving aspects of the administrative process may well amount to a failure to exhaust. See *McGee* v. *United States, supra,* 402 U.S. at 488–491.

B. PETITIONER WAS NOT EXCUSED FROM THE EXHAUSTION REQUIREMENT BECAUSE OF DELAY IN PROCESSING HIS FORMAL COMPLAINT OR BECAUSE AN APPEAL WOULD HAVE BEEN "FUTILE"

It has long been settled that the failure to pursue an available administrative appeal precludes resort to the courts. *United States* v. *Sing Tuck,* 194 U.S. 161. Apart from petitioner's broadside attack on the exhaustion rule generally, he argues more narrowly that he was not required to appeal his agency's decision to the Civil Service Commission because the agency did not issue its final decision until 617 days after he filed his formal complaint (Br. 61–64) and because an appeal to the Commission would have been futile (Br. 64–65).

1. Petitioner should not be heard to complain at this stage of delays in the processing of his formal complaint. The Commission's Equal Opportunity Regulations in force at the time petitioner filed his complaint contemplated that, except in unusual circumstances, agencies would take final action on discrimination complaints within 60 days (excluding time spent in processing complaints by the complaints examiner). 5 C.F.R. (1971 rev.) 713.220(a). They specifically provided, moreover, that administrative relief could be sought from any unnecessary delay (*ibid.*):

> When the complaint has not been resolved within this limit, the complainant may appeal to the [Civil Service] Commission for a review of the reasons for the delay. Upon review of this appeal, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may

accept the appeal for consideration under § 713.234.

Had petitioner been aggrieved by the General Services Administration's delay in processing his complaint, he thus had a suitable administrative remedy before the Civil Service Commission. Petitioner, however, did not seek review of the reasons for the delay.

Moreover, the current provision contemplating a final decision by the agency within 180 days, *including* the time spent in processing the complaint by the complaints examiner (5 C.F.R. 713.220(a)), was promulgated on October 21, 1972 (37 Fed. Reg. 22717), two days after petitioner was notified of his right to a hearing (A. 30a–31a). The agency issued its final decision, after a hearing and the submission of the examiner's findings and recommendations, 153 days after the date on which the new regulations were promulgated.

Petitioner argues that, since Congress in Section 717 authorized the filing of a civil action, without further exhaustion of administrative remedies, after the agency issues its final decision or after 180 days elapse without final agency action, complainants who sue under statutes other than Section 717 should be treated similarly. But petitioner's action would be barred even if he were treated similarly. Section 717 (c) authorizes the filing of an action within 30 days of the agency's final decision or after 180 days from the filing of the initial charge "until such time as final action may be taken * * *." Petitioner did not file this action before his agency issued its final decision,

nor did he file it within 30 days after he was notified of that decision.

Section 717 relaxes the usual exhaustion requirement but imposes strict and clearly defined time restrictions on those who choose to forego the pursuit of further administrative remedies. Petitioner seeks impermissibly to exploit the one while ignoring the other.

2. Petitioner also argues that "an appeal to the Appeals Review Board would be futile" because the Board rarely reverses an agency decision (Br. 64). We have set forth as an appendix to this brief (*infra,* p. 53a) a table of statistics furnished to us by the Civil Service Commission showing the Appeals Review Board's disposition of appeals for fiscal years 1973, 1974, and 1975. As the table indicates, in the most recent fiscal year the Board disposed of 749 appeals, affirming agency decisions in 564 cases (or 75 percent), reversing in 74 cases (or 10 percent), and remanding to the agency in 111 cases (or 15 percent).[36]

These figures do not support petitioner's claim that "the process is little more than an empty ritual" (Br. 65). On the contrary, they reflect a vital, deliberative process in which cases are disposed of according to their merits. That the Board affirms agency decisions more often than it reverses them may mean

[36] The Board affirmed agency findings of no discrimination in 405 cases (or 54 percent of the appeals) and reversed such findings upon determining that discrimination had occurred in 16 cases (or two percent). Of those cases in which the Board affirmed or reversed findings of no discrimination, the reversals constitute four percent.

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only that the agency decisions are correct more often than they are incorrect. It does not mean that the appeal process is futile.[37]

It follows that petitioner's failure to appeal his agency's decision to the Civil Service Commission bars the present action and that the district court therefore correctly dismissed the complaint.[38]

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[37] The reversal rate in the federal judicial system is also relatively low. But it would be inaccurate to say that an appeal to a court of appeals would be futile in all cases, irrespective of the merits, simply because only 18.6 percent of the judgments appealed from are reversed, or that a petition for a writ of certiorari to this Court would be futile because only six percent of the petitions filed are granted. See Annual Report of the Director of the Administrative Office of the United States Courts, 1974, pp. 193, 367 (1975).

[38] Petitioner argues that, "where a party has not properly exhausted his administrative remedies, the court is not to dismiss the case but merely to stay proceedings while that administrative proceeding is resumed and completed" (Br. 65). The question whether dismissal of the complaint is an appropriate disposition when it appears that the plaintiff has failed to exhaust available administrative remedies was not presented by the petition for a writ of certiorari in this case and should not be considered by this Court.

In any event, dismissal was proper in this case because the time for appealing to the Civil Service Commission had already expired when petitioner filed this action. There is no contention here that petitioner was not given proper notice of the time and manner for filing an appeal. Cf. *Christian* v. *New York State Department of Labor*, *supra*, 414 U.S. at 623–624 and n. 10. Having allowed the time to expire, petitioner may not recapture his lost opportunity simply by filing a civil action that is precluded for failure to exhaust administrative remedies. If that were possible, the integrity of the administrative time restrictions would be undermined.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

• • • • • • •

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the

[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the excercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of

the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its *activities*.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs*, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, in-*

cluding on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b)*, shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(b) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts

upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a*

case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (*c*) *or* (*d*) *of this section or further* efforts of the Commission to obtain voluntary compliance.

(*2*) *Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.*

(*3*) *Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.*

(*4*) *It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the*

case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(*5*) *It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.*

(*g*) *If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).*

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a

complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all

court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable,

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necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied*, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of

the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official*

functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of

the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department

agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

APPENDIX B

THE CIVIL SERVICE COMMISSION'S EQUAL OPPORTUNITY REGULATIONS

PART 713—EQUAL OPPORTUNITY

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Subpart B of Part 713 Equal Opportunity is revised to implement the Equal Employment Opportunity Act of 1972, 86 Stat. 103, and to strengthen the system of complaint processing. Among others, these changes emphasize the affirmative aspects of agency equal employment opportunity obligations, set out requirements for submission of national and regional plans, extend the time limits for contacting a counselor, provide for the reasonable accommodation to the religious needs of applicants and employees, provide for timely investigation and resolution of complaints including complaints of coercion and reprisal, set out the remedial action available(including back pay), and strengthen the third party complaint system.

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AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

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713.271 Remedial actions.

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AUTHORITY: The provisions of this Subpart B issued under 5 U.S.C. 1301, 3301, 3302, 7151–7154, 7301; 86 Stat. 111; E.O. 10577; 3 CFR, 1954–58 Comp., p. 218, E.O. 11222, 3 CFR 1964–1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

§ 713.201 PURPOSE AND APPLICABILITY

(a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) Applicability. (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 713.202 GENERAL POLICY

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to pro-

hibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 713.203 AGENCY PROGRAM

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employee by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior acomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

§ 713.204 IMPLEMENTATION OF AGENCY PROGRAM

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 713.202 and its program established in accordance with § 713.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of;

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 713.202 and the agency program required to be established under § 713.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or

disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 713.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 713.211 through 713.222;

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency subject to § 713.251.

(7) When authorized by the head of the agency, making the decision under § 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing at his

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discretion, the record on any complaint before the decision is made under § 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 713.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor.

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so; and

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to—

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 713.205 COMMISSION REVIEW AND EVALUATION OF AGENCY PROGRAM OPERATIONS

The Commission shall review and evaluate agency program operations periodically, obtain

such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

Agency Regulations for Processing Complaints of Discrimination

§ 713.211 GENERAL

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 713.212 through 713.222.

§ 713.212 COVERAGE

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222. (Section 713.251 applies to general allegations by organizations or other third parties.)

§ 713.213 PRECOMPLAINT PROCESSING

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to re-

strain the aggrieved person from filing a formal complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the peformance of his duties under this section.

§ 733.214 FILING AND PRESENTATION OF COMPLAINT

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complaintant in writing of all his administrative rights and of his right to file a civil action as set forth in § 713.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) Presentation of complaint. At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency

and ne designates another employee of the agency as his representative, the representative, shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 713.215 REJECTION OR CANCELLATION OF COMPLAINT

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 713.281.

§ 713.216 INVESTIGATION

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under

oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the

person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

§ 713.217 ADJUSTMENT OF COMPLAINT AND OFFER OF HEARING

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a

decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 713.231. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complainant, together with the complaint file shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.

§ 713.218 HEARING.

(a) Complaints examiner. The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense

is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the

representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of complaints examiner. In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;
(2) Regulate the course of the hearing;
(3) Rule on offers of proof;
(4) Limit the number of witnesses whose testimony would be unduly repetitious; and
(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) Witnesses at hearing. The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the

complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) Findings, analysis, and recommendations. The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 713.219 RELATIONSHIP TO OTHER AGENCY APPELLATE PROCEDURES

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency, the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

§ 713.220 AVOIDANCE OF DELAY

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 713.218.

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right

of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 713.281.

§ 713.221 DECISION BY HEAD OF AGENCY OR DESIGNEE

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative. When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require

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remedial action to be taken in accordance with § 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the complaint file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission of his right to file a civil action in accordance with § 713.281, and of the time limits applicable thereto.

§ 713.222 COMPLAINT FILE

The agency shall establish a complaint file. Except as provided in § 713.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 713.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under §713.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints ex-

aminer's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.

APPEAL TO THE COMMISSION

§ 713.231 ENTITLEMENT

(a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint, or a portion thereof, for reasons covered by § 713.215; or

(2) To cancel his complaint because of the complainant's failure to prosecute his complaint; or

(3) On the merits of the complaint, under § 713.217(c) or § 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

§ 713.232 WHERE TO APPEAL

The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

§ 713.233 TIME LIMIT

(a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

§ 713.234 APPELLATE PROCEDURES

The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.235 REVIEW BY THE COMMISSIONERS

The Commissioners may, in their discretion, reopen and reconsider any previous decision

when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

§ 713.236 RELATIONSHIP TO OTHER APPEALS

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

REPORTS TO THE COMMISSION

§ 713.241 REPORTS TO THE COMMISSION ON COMPLAINTS

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

THIRD PARTY ALLEGATIONS

§ 713.251 THIRD-PARTY ALLEGATION OF DISCRIMINATION

(a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c) Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 713.261 FREEDOM FROM REPRISAL

(a) Complainants, their representatives, and witnesses shall be free from restraint interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

§ 713.262 REVIEW OF ALLEGATIONS OF REPRISAL

(a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 713.214(a)(2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the

charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under § 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

§ 713.271 REMEDIAL ACTIONS

(a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which

backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right To File a Civil Action

§ 713.281 STATUTORY RIGHT

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate U.S. District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint.

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

§ 713.282 NOTICE OF RIGHT

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215 and 713.217, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil

action, and of the 30-day time limit for filing, in any decision under § 713.234.

§ 713.283 EFFECT ON ADMINISTRATIVE PROCESSING

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

UNITED STATES CIVIL SERVICE COMMISSION,
[SEAL] JAMES C. SPRY,
Executive Assistant to the Commissioners.

[FR Doc. 72-18054 Filed 10-20-72; 8:49 am]

APPENDIX C

APPEALS REVIEW BOARD DISPOSITION OF EEO APPEALS

	FY 1973	FY 1974	FY 1975
TOTAL APPEALS CLOSED 1/	677	727	749
AFFIRMED AGENCY DECISION	608	595	564
Agency found no discrimination	454	427	371
Agency found no discrimination (but further corrective action recommended by ARB)	11	12	34
Agency found discrimination	3	4	4
Agency found discrimination (further corrective action recommended by ARB)	9	4	11
Agency found complaint untimely or not within purview of regulations	131	148	144
REVERSED AGENCY DECISION	44	50	74
Agency found no discrimination	11	18	16
Agency found complaint untimely or not within purview of regulations	21	23	23
Improper rejection or cancellation of complaint	7	2	32
Failure to follow proper procedures	5	7	3
REMANDED TO AGENCY FOR FURTHER INVESTIGATION OR REHEARING	25	82	111

1/ Excludes appeals cancelled by complainant before decision or rejected by Board as untimely.

* U.S. GOVERNMENT PRINTING OFFICE : 1975 O - 594-115